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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. **1065** 116

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW
YORK, AND BRIEF IN SUPPORT THEREOF**

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INDEX

	PAGE
Action in the State Courts	2
Brief in Support of Petition	15
Facts from Which the Controversy Arises	6
Jurisdiction	4
Summary and Brief Statement of the Matters Involved	5
The Decisions of the Courts of the State of New York	8
The Opinions in the State Courts	4
The Question Presented	10
Reasons for Allowance of the Writ	11

Table of Cases Cited

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55	6, 20
Gaynor v. Marohn, 268 N. Y. 417	9, 20, 21
Houck v. Little River Drainage Dist., 239 U. S. 254....	19
Kansas City Southern Ry. Co. v. Road Improvement Dist., 256 U. S. 658	6, 20
Los Angeles v. Los Angeles Gas & Electric Co., 251 U. S. 32	11
Matter of Boonville v. Maltbie, 272 N. Y. 40	11
Matter of Tierney v. Cohen, 268 N. Y. 464.....	9, 19

	PAGE
Memphis & Charleston Railway Co. <i>v.</i> Pace, 282 U. S. 241	20
Myles Salt Co. <i>v.</i> Iberia & St. Mary Drainage Dist., 239 U. S. 478	6, 10, 16, 17, 20
Nashville, Chattanooga & St. Louis Ry. <i>v.</i> Walters, 294 U. S. 405	5, 9, 16
New York Edison Company, Inc. <i>v.</i> City of New York, 268 N. Y. 669	9, 19
Phillip Wagner <i>v.</i> Leser, 239 U. S. 207	18
Road Improvement Dist. <i>v.</i> Missouri P. R. R., 274 U. S. 187	20
Thomas <i>v.</i> Kansas City Southern Ry. Co., 261 U. S. 481	6, 20
Valley Farms Co. <i>v.</i> Westchester County, 261 U. S. 155	19
Village of Kenmore <i>v.</i> Erie County, 252 N. Y. 437.....	21

Table of New York State Constitution and Statutes Cited

New York State Constitution, Article VIII, Section 2	9
General Municipal Law of the State of New York (Laws, 1934, Chap. 281)	2, 5, 8, 16
New York Laws, 1935, Chap. 842	21

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Respondents.

Petition

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Despatch Shops, Inc., a corporation duly organized and existing under and by virtue of the Laws of the State of New York, respectfully prays that a writ of certiorari issue herein to review a certain final decision of the Court of Appeals of the State of New York, being the highest court of said State, the opinion and decision of said Court having been rendered and filed on March 2, 1944, on the question whether said decision and

judgment contravened the rights of petitioner under the Fourteenth Amendment to the Constitution of the United States in that by said decision and judgment herein sought to be reviewed the property of petitioner is made subject to levy and assessment for taxes to make up any deficit from the operation of a municipal electric plant and distribution system proposed to be constructed and operated by the respondents, the while petitioner is excluded from any possible service from the proposed plant and system.

Action in the State Courts

An action was originally instituted in the Supreme Court of the State of New York for the County of Monroe by one James O'Flynn, on behalf of himself and all other taxpayers in the Village of East Rochester similarly situated, praying for a judicial declaration that Article 14-A of the General Municipal Law of the State of New York (added by New York Laws of 1934, chap. 281) was unconstitutional and requesting that an injunction issue against the proposed construction by the Village of East Rochester of a municipal electric plant, allegedly pursuant to the provisions of such Article. Petitioner, Despatch Shops, Inc., and others, in accordance with orders entered upon stipulations signed by the attorneys for all the parties, duly intervened in the action and served supplemental complaints (R. 38-47). In its complaint petitioner set forth the various instances in which it was contended that the respondents had failed to comply with the constitutional and statutory provisions of law in proposing this contemplated municipal project. Among other contentions raised by petitioner was that Article 14-A of the General Municipal Law of the State of New York had been applied in an invalid and unlawful manner in such a way as to

violate the constitutional and legal rights of petitioner (R. 45-46).

Specifically, it was alleged that the Constitution of the United States was violated in that petitioner's property will be taken without due process of law; that petitioner's property would be subject to taxation without any benefit since petitioner, Despatch Shops, Inc. (R. 45), will be illegally and arbitrarily discriminated against in that the proposed project excludes this petitioner from all benefit of the current to be generated at the proposed municipal electric plant (said current, however, to be available to all other industrial and commercial users of electricity in the Village [R. 42]), although the property of petitioner, Despatch Shops, Inc., the largest taxpayer in the Village, paying about seven per cent of all the taxes collected in the Village (R. 131; 167) and the largest consumer of electric power in the Village (R. 167), nevertheless will be subject, under the terms of the ordinance initiating said municipal project, to levy and assessment to make up any deficits in the operation of said municipal plant (R. 29). Petitioners complained of this action of the Village officials in deciding upon the unheard of experiment of constructing a municipal generating plant and system for the ostensible purpose, as stated in the ordinance, of authorizing the construction of such public utility service for the "generation, furnishing and transmission of electricity for light, heat and power to the Village of East Rochester or for compensation to its inhabitants," but actually, as conceded at the trial, with no generating capacity to care for the needs of petitioner, Despatch Shops, Inc. (R. 249).

After a trial before an Official Referee judgment was entered dismissing the original complaint, as well as the supplemental complaints filed by petitioner, among others.

From said judgment this petitioner, as well as other intervenors, appealed to the Appellate Division of the Supreme Court in and for the Fourth Judicial Department, where the judgment was affirmed (262 N. Y. App. Div. 556). Thereafter, pursuant to permission granted by the Court of Appeals of the State of New York, petitioner appealed to that Court from said judgment of affirmance. That appeal came on for argument before the highest court of the State of New York on November 22, 1943, and on March 2, 1944, that Court rendered its decision affirming the judgment appealed from, Judges Lewis and Conway dissenting on the constitutional ground. Judgment became final on March 2, 1944.

Opinions of the State Courts

The opinion of the Official Referee,* before whom the case was tried at Special Term (24 N. Y. Supp. [2d] 437, not officially reported), is printed in the Record at pages 179 to 189. The opinion of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department* (262 App. Div. 556) is printed in the Record at pages 662 to 679. The majority opinion of the Court of Appeals (292 N. Y. 156) is printed in the Record at pages 689 to 698, and the opinion of the dissenting Judges of the Court of Appeals at pages 699 and 700.

Jurisdiction

This petition for a writ of certiorari is filed within three months of the time when said judgment became

* The opinions rendered by the Special Term and the Appellate Division dealt not only with the instant case but also with another action, entitled *Village of East Rochester v. Rochester Gas and Electric Corporation*, which was concerned with the validity of certain easements of the defendant corporation. That case is not involved in the present petition to this Court.

final, and there is presented herewith a certified copy of the entire record and proceedings in the action, including those in the Court of Appeals of the State of New York.

This petition for a writ of certiorari is filed under the provisions of Title 28, United States Code, Section 344, paragraph (b); Section 237, Judicial Code, as amended.

Summary and Brief Statement of the Matters Involved

The Issue Involved

The sole issue presented herein is whether a municipal corporation may, pursuant to a legislative grant of power to construct and operate a municipal public utility service (Article 14-A, General Municipal Law, State of New York), construct and operate an electric generating plant and distribution system sufficient to supply the needs of all the inhabitants of the municipality except one—a large industrial consumer of electric power and the largest taxpayer in the municipality—while the property of such excluded inhabitant is subjected under the terms of the very ordinance initiating such project, and the Constitution and statutes of the State, to levy and assessment for a tax sufficient to pay the principal of and interest on the bonds to be issued to finance the project, as the same shall become due, to the extent that funds are not available for that purpose from the revenues of the project. The majority of the Court of Appeals of the State of New York held that the imposition of such a tax would not be arbitrary or discriminatory; that a tax so raised may constitutionally be applied to purposes for which the individual taxpayer receives no benefit, citing among other decisions, *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U. S. 405. Your petitioner urges that

the Court erred for this Court has repeatedly held that it is a violation of the Fourteenth Amendment to the Federal Constitution for a municipality to impose a tax, particularly one of the nature involved herein, without benefit to the taxpayer (See *Myles Salt Co. v. Iberia & St. Mary Drainage Dist.*, 239 U. S. 478; *Gast Realty & Invest. Co. v. Schneider Granite Co.*, 240 U. S. 55; *Kansas City Southern Ry. Co. v. Road Improv. Dist. No. 6*, 256 U. S. 658; *Thomas v. Kansas City Southern Ry. Co.*, 261 U. S. 481.)

Facts From Which This Controversy Arises

This case is concerned with the establishment of a municipal electric plant and distribution system for the Village of East Rochester, Monroe County, New York. The Board of Trustees of the Village, after some previous discussion among themselves, engaged engineers to make studies of the feasibility of establishing a municipal generating plant and system for the Village. The engineers concluded that an electric utility system would be practical. Thereafter the Village Board directed the engineers to prepare plans and specifications for the construction of a generating plant and electric distribution system. These plans and specifications were prepared and filed with the Village Clerk and two days thereafter the Board, without any previous notice to the public, met and passed an ordinance providing for the establishment of a municipal plant and a resolution providing for the submission of the proposition to the voters and a notice of special election. At the election thus called—at which both taxpayers and non-taxpayers were permitted to vote—approximately seventy percent voted in favor of the proposition and thirty percent were opposed.

This ordinance purported to authorize the construction of a public utility service for the purpose of “gen-

eration, furnishing and transmission of electricity" to supply "light, heat and power to the Village of East Rochester or for compensation to its inhabitants" (R. 26) and to provide for the issuance of bonds not to exceed \$360,000 to finance such project (R. 28). The Village officials in a pamphlet published in support of the project and which was circularized among the voters prior to the election, represented that the plant they proposed to construct and operate would be capable of competing with and in all respects equivalent to that which Rochester Gas and Electric Corporation (the electric utility rendering service to all inhabitants, including petitioner, who desire same), has in said Village (R. 48-66). The fact is, however, that no service whatsoever to petitioner, Despatch Shops, Inc., was contemplated, nor could such service be supplied to this petitioner with the capacity of the proposed plant. Not only was it conceded on the trial that the plant provided for would not have sufficient generating capacity to supply the needs of petitioner, Despatch Shops, Inc. (R. 249), but the reports of the engineers excluded this industrial user as a possible consumer (R. 525).

As previously pointed out in this petition, a taxpayer's action was instituted by one James O'Flynn for a judicial declaration of the invalidity of the proposed project. Because of the peculiar position of petitioner, Despatch Shops, Inc., with respect to this proposed village project, and in accordance with an order entered upon a stipulation signed by the attorneys for all the parties to the action, petitioner duly intervened and served a supplemental complaint. In this complaint, petitioner set forth the various instances in which it contended that the Village officials had failed to comply with the constitutional and statutory provisions of law in proposing their project.

Specifically, so far as this petition to this Court for a writ of certiorari is concerned, petitioner alleged that Article 14-A of the General Municipal Law of the State of New York had in this instance been applied in an invalid and unlawful manner and in such a way as to violate the constitutional and legal rights of petitioner and a judgment to that effect was prayed for (R. 46).

The Decisions of the Courts of the State of New York

The courts of New York State denied the requested relief. While the courts below all denied the relief sought by petitioner, Despatch Shops, Inc., their reasons for such denial were most divergent. Thus, the Special Term said that the resources of the Village were limited and that it was not planned or intended that the Village plant will or can always generate sufficient power to meet the demands of this petitioner. He held that Article 14-A did not make it a prerequisite that a municipal power plant be capable of generating power sufficient to supply the full needs of all taxpayers since it had the power to purchase supplemental energy (See opinion of Official Referee, R. at pp. 184-185). Such reasoning disregarded the fact that the ordinance initiating the project made no provision whatsoever for purchased energy, but was solely limited to the *generation* of electricity by the proposed plant and the distribution of such energy "to the Village of East Rochester or for compensation to its inhabitants * * *". Furthermore, the plans and specifications definitely excluded petitioner, Despatch Shops, Inc., from any service from the proposed plant.

The Appellate Division, in affirming the decision of the Official Referee, recognized the pertinency of the contention of this petitioner with respect to the imposition of taxes

without any attendant benefit, for the Court said that if a deficit in the operation of the municipal project did occur, "the public authorities would be required to spread the tax only on benefited property" (See opinion of Appellate Division, R. at p. 679). If such were the law, petitioner would not be harmed and never would have intervened in this action and would not be petitioning this Court to review the determination reached herein. However, it is clear under the Constitution and the judicial decisions of New York that any indebtedness incurred by a municipality must have pledged behind it for the payment of the principal thereof and the interest thereon the full faith and credit of all taxable property in the issuing municipality (N. Y. State Const. Art. VIII, Sect. 2; *Matter of Tierney v. Cohen*, 268 N. Y. 464; *New York Edison Company, Inc. v. City of New York*, 268 N. Y. 669; *Gaynor v. Marohn*, 268 N. Y. 417).

The majority of the Court of Appeals abandoned this specious reasoning and held that the fact that the ordinance provided that a sufficient tax be levied each year to pay the principal of and the interest on the bonds as the same should become due, to such an extent as funds should not be available for those purposes from the revenues of the project, did not result in arbitrary or discriminatory taxation, saying that "Moneys thus raised may constitutionally be applied to purposes from which the individual taxpayer receives no benefit, and indeed may suffer a serious detriment (*Nashville, C. & St. Louis Ry v. Walters*, 294 U. S. 405, 429-430)." (See opinion of Majority of Court of Appeals, R. at p. 698.)

The dissenting Judges of the Court of Appeals based their dissent directly upon this point saying, in part (See dissenting opinion of Judges of Court of Appeals, R. at pp. 699-700) :

"In that connection it is to be noted that the statute (*General Municipal Law*, §360, subd. 2), under which the respondent Village claims its power to undertake the project here involved, authorizes it to construct and operate the proposed public utility as an agency to furnish service '*to its inhabitants*', not to a portion thereof. The decision in effect construes the statutory phrase '*to its inhabitants*' as meaning that the service to be furnished may be '*to its inhabitants*' except a single taxpayer. In this instance that single taxpayer—although denied special benefits to be afforded other inhabitants—concededly may be called upon to pay a large portion of the principal and interest of the bonded debt to be incurred. Insofar as the project will afford to other inhabitants of the Village special benefits which are denied to Despatch Shops, Inc.—although that corporation may be called upon as a taxpayer to meet its share of the cost and maintenance of the plant—I believe the plan as now formulated will result in an unconstitutional taking of property through illegal taxation. (See *Myles Salt Co. v. Iberia Drainage Dist.*, 239 U. S. 478, 485.)"

Thus, it can readily be seen that despite the unanimity of decision of the judges of the courts of the State of New York who have passed upon this case (with the exception of the two dissenting judges of the Court of Appeals of the State) there is a wide divergence in the reasons supporting such conclusion.

The Question Presented

The question presented to the Court in this case, as hereinbefore indicated, may be concisely stated as follows:

Whether a municipal subdivision of a State having authority under a general legislative enabling act to erect and operate a municipal electric gen-

erating plant and distribution system within the municipality, may construct and place into operation an electric system, which concededly will be sufficient to serve all the inhabitants save one—the largest taxpayer and largest consumer of electric power in the municipality—but nevertheless subject the property of such excluded taxpayer to levy and assessment in order to pay the principal of and interest on bonds, which are to be issued to finance the project, as the same shall become due and payable to the extent that funds are not available for that purpose from the revenues of the project?

Reasons For Allowance of the Writ

Your petitioner respectfully shows to this Court that this is a question of utmost importance, involving municipal undertakings of the nature embraced in this lawsuit. If the law as presently enunciated in the decision of the majority of the Court of Appeals of the State of New York is permitted to stand, it means that any municipality may venture into a field purely "proprietary as contrasted with its governmental capacity" (*Matter of Village of Boonville v. Maltbie*, 272 N. Y. 40, 46; see also *Los Angeles v. Los Angeles Gas & Electric Co.*, 251 U. S. 32) with the expressed intention of serving only a limited number of the taxpayers of the municipality from the contemplated project and nevertheless subject the taxable property of those excluded from all benefits from the proprietary enterprise to levy and assessment to make up any deficit resulting from the operation of the enterprise. Such a proposition, it is submitted runs counter to the provision of the United States Constitution that property shall not be taken without due process of law.

The reasoning of the Court of Appeals of the State of New York abandons in this instance all distinction be-

tween the governmental functions, which a municipal corporation may exercise and levy taxes to support even though in some particular instance there is no specific benefit to the taxpayer, and the embarking upon a proprietary venture designed to serve some, but not all, of the inhabitants, but nevertheless subjecting the property of the excluded inhabitants to taxation to support such a project. It is believed that under our Federal Constitutional safeguards the latter cannot be done. But it is submitted such is just what the decision of the New York Court of Appeals permits.

The importance of this question transcends the immediate issues between petitioner and the respondents for the principle engrafted on the Constitution is not of limited or local application. It is believed that the decision of the Court of Appeals of New York in this respect, as is pointed out in the brief accompanying this petition and attached hereto, is contrary to the doctrines enunciated by this Court regarding the fundamental principles of taxation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, directing that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and the proceedings had herein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed, and for such other and further relief as may be appropriate and granted in the premises.

DESPATCH SHOPS, INC.

By MARTIN J. ALGER,

President.

DANIEL M. BEACH,

Attorney for Petitioner.

State of New York }
County of Monroe } ss.:

MARTIN J. ALGER, being duly sworn deposes and says: That he is the President of DESPATCH SHOPS, Inc., the petitioner above-named, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein and that such statements are true, except those stated to be upon information and belief, and those he believes to be true.

MARTIN J. ALGER.

Subscribed and sworn to before me }
this 26th day of May, 1944. }

WM. F. McGINN

NOTARY PUBLIC, WESTCHESTER COUNTY

CERT. FILED IN N. Y. CO. NO. 101, REG. NO. 71 MC 5

COMMISSION EXPIRES MARCH 30, 1945

State of New York }
County of Monroe } ss.:

DANIEL M. BEACH, being duly sworn, deposes and says: That he is the attorney for the petitioner in the foregoing petition; that he has read the said petition and has personal knowledge of the matters and things therein set forth, and believe the same to be true.

Affiant further states that the said petition for a writ of certiorari is prepared and filed in the utmost good faith, believing that the same is meritorious, and that said petition is not prepared and presented in order to be vexatious or to delay the final opinion and judgment in the case.

DANIEL M. BEACH.

Subscribed and sworn to before me }
this day of May, 1944. }